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No. 98-1600

In the
Supreme Court of the United States
October Term, 1998

ROBERT W. "BOBBY" UNSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a person can be convicted of a crime without proof of *mens rea*:

a. in the absence of a clear indication on the part of Congress to dispense with the *mens rea* requirement; and

b. when the crime does not satisfy the requirements for a public welfare offense as established by *Morissette v. United States*, 342 U.S. 246 (1952), and its progeny?

2. Whether a court may shift the burden of proof of an affirmative defense to the defendant in the absence of an act of Congress authorizing that shift without violating the Due Process Clause of the Fifth Amendment?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the petition for writ of certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the adoption, interpretation, and administration of laws and regulations.

There is a growing trend among federal agencies and the courts to expand the enforcement power of the government incrementally by adopting regulatory interpretations that go

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

beyond their plain meaning and intent. This case is a singular example of government overreaching.

Contrary to common sense and Supreme Court precedent, the Tenth Circuit has held innocent conduct constitutes a crime punishable by fine or imprisonment or both under a federal statute. Strict liability offenses undermine the freedoms of all citizens and should be narrowly construed.

PLF has participated in numerous cases involving the interpretation of federal laws. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). PLF also participated as amicus curiae in this Court in the *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998); *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

PLF's public policy perspective will provide a necessary viewpoint on the issues presented in this case.

INTRODUCTION

This case presents an outrageous application of the "public welfare offense" doctrine. Under Tenth Circuit jurisprudence, innocent conduct becomes criminal--a snowmobiler loses his way in a snowstorm and is convicted of possessing and operating a motor vehicle in an unmarked Wilderness Area. This is contrary to Supreme Court precedent and an assault on common sense. Only in very limited circumstances has this Court inferred from congressional silence that Congress did not intend to require proof of criminal intent to establish an offense. However, some lower courts are regularly making just such an inference.

To be sure, strict criminal liability eases the prosecution's path to conviction and facilitates enforcement of the law but only at the expense of fundamental concepts of fairness and constitutional principles of due process. This case, and others like it, turn our traditional values upside down. American jurisprudence is founded on the bedrock principle that it is better to let the guilty go free than unfairly punish the innocent. The idea that one can be held criminally liable, even imprisoned, for innocent conduct serves no meaningful law enforcement purpose. It neither reforms conduct nor deters wrongdoing. To the contrary, it serves only to place retaliation and vengeance as the motivation for public prosecution.

Strict criminal liability for ordinary acts is reminiscent of those immature systems of law whereby a tribunal is convened only to establish guilt for enemies of the state and not to determine innocence. This type of process is incompatible with a free society and should not be countenanced by this Court, or any other. For this reason, this Court should grant the petition for writ of certiorari and place meaningful limits on the expanding scope of the "public welfare offense" doctrine. Virtually all of our criminal laws serve to protect public health and welfare. All of us are capable of unwitting acts that put us in conflict with such laws. This Court should not allow federal statutes to be read to dispense with a *mens rea* where doing so would criminalize a broad range of apparently innocent conduct.

STATEMENT OF THE CASE

Robert "Bobby" Unser and a friend were snowmobiling in Southern Colorado in the area of the Rio Grande National Forest. During their venture, sudden winds blew fallen snow in their path reducing visibility to near zero. In the process of finding their way back to their starting point, Unser and his friend became lost. Unser's friend drove off into a ravine where his snowmobile stuck. The two men continued on Unser's snowmobile until it quit. Believing themselves in danger, they tried walking out of the area. However, by nightfall, they were

still lost and had to pass the night in a snow cave they dug with their hands. They survived the night but were in dire straits. At times disoriented and sick, they walked most of the next day and night until they came on a barn with a phone. They called for help and were rescued. Unser and his friend were treated at a local hospital for frostbite, dehydration, and exhaustion.

Three weeks later, Unser contacted the Forest Service for assistance in finding his snowmobiles. It became apparent from Unser's description of the area where he thought he had abandoned the snowmobiles that he and his friend had inadvertently entered the South San Juan Wilderness Area while lost in the snow storm. A Forest Service regulation prohibited the possession or use of a motorized vehicle in the Wilderness Area and imposed a criminal penalty of up to six months in jail or $5,000 in fines, or both. Unser was cited for violating this regulation. He was subsequently convicted of a misdemeanor, and fined $75.

On principle, Unser appealed the case arguing he could not be found guilty of a crime without some knowledge or criminal intent and, in any event, he was excused because of necessity. On review, the Tenth Circuit Court of Appeals held that Unser could be held liable for a crime without any "guilty purpose" because the regulation prohibiting motorized vehicles in a Wilderness Area constituted a "public welfare offense." Such offenses, the court argued, do not require criminal intent (or *mens rea*). The court dismissed the necessity defense for lack of evidence.

SUMMARY OF THE ARGUMENT

The Tenth Circuit has taken the "public welfare offense" to a ridiculous extreme, finding that wholly innocent conduct is a crime. This ruling is important because it draws into question fundamental principles of criminal law. With the complicity of the courts, legislators and prosecutorial agencies are seeking quick convictions based on strict liability offenses. This is most

evident in the increasing enforcement trends under federal environmental statutes which are readily characterized as "public welfare" statutes. But when such offenses encompass innocuous acts, they fail to deter crime and defy common sense. Such strict regulation violates the long-held doctrine that an injury can amount to a crime only when inflicted by guilty intention.

The Tenth Circuit read too much into this Court's acknowledgment in *Morissette* that a "public welfare offense" may obviate the intent element of a crime. In *Morissette*, this Court found the crime of conversion of government property required a criminal intent that was lacking in that case as the accused did not know he was stealing. This Court expressly affirmed that criminal intent must accompany criminal act and narrowly circumscribed the "public welfare offense" doctrine. Only in limited circumstances has this Court inferred from silence that Congress did not intend to require proof of *mens rea*, such as where the penalties are small, conviction does no grave harm to one's reputation, and where one assumes a special responsibility to protect the public from one's acts. However, these factors did not converge in this case.

Unser was potentially subject to a criminal penalty of up to six months in jail or $5,000 in fines, or both. It would be inconceivable to characterize these penalties as "small." As a factual matter, Unser was publicly ridiculed as an environmental criminal. Therefore, grave harm was done his reputation. As for his special responsibility to protect the public, Unser had no reason to believe his innocent outing would become life-threatening and force him into a technical violation of the law by mistakenly wandering into a Wilderness Area. Accordingly, *Morissette* undercuts the decision below. So does *Staples v. United States*, but in a more direct way.

In *Staples*, this Court applied a common sense examination to determine whether mere possession of a gun under the National Firearms Act was a "public welfare offense" that did not require a criminal intent. Notwithstanding persistent

arguments by the government that a gun is a dangerous device and is highly regulated, this Court found the possession of a gun was innocent conduct that did not justify eliminating a *mens rea* requirement when Congress was silent on the subject. The impetus for the Court's decision was its concern for criminalizing a "broad range of apparently innocent conduct." Under *Staples*, the innocence of the conduct is a factor in defining a "public welfare offense." This is the crucial point the Tenth Circuit missed.

The present case parallels *Staples* and dictates the same result. Unser was convicted of possession and operation of a motor vehicle within a Wilderness Area under a federal statute that was silent on the intent element. His conduct was innocent as he was driven by a snow storm out of his way and blundered into the unmarked area. If possession of a gun is not a "public welfare offense," neither is possession and operation of a snowmobile in extremis. The Tenth Circuit's contrary ruling defies common sense and establishes a precedent that justifies criminalizing a broad range of apparently innocent conduct. This Court should grant review and overturn the decision below.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE AN IMPORTANT QUESTION OF LAW PERTAINING TO THE CRIMINALIZATION OF A BROAD RANGE OF INNOCENT CONDUCT

A. Overzealous Application of the "Public Welfare Offense" Raises Questions Both Fundamental and Far-Reaching in Federal Criminal Law That Warrant a Response by This Court

The importance of this case cannot be overstated. As the Tenth Circuit explained:

> This case arises from a story of survival in the wilderness under extreme conditions and involves legal issues requiring examination of some of the most fundamental concepts in criminal law. Like the parties obviously do, we view the case as having significance beyond the penalty actually imposed.

Indeed, this case is significant because the lower court decision authorizes criminal prosecution for inadvertent conduct that causes no real harm to public health or safety. In fact, this case turns fundamental concepts of criminal law on their head. It does away with the presumption of innocence and infers strict criminal liability from both congressional and agency silence. The lower court's lavish extension of the so-called "public welfare offense" exceeds the bounds of reason, good government, and the established precedents of this Court.

Regrettably, overzealous application of the "public welfare offense" seems to be a growing trend as Petitioner points out in his brief, establishing a conflict among the circuits. Moreover, there is a growing trend among prosecutorial agencies to rely on the ease of strict liability statutes to get a quick conviction. Nowhere is this more evident than in the enforcement of our federal environmental laws.

In a recent law review article, *Criminal Enforcement of Environmental Laws*, 10 Colorado Journal of International Environmental Law & Policy 39, Kevin Gaynor and Thomas Bartman catalogue the increase in environmental law enforcement over the last ten or more years. They discuss with some concern the tendency for courts and prosecutors to raise the penalty while lowering the bar on convictions. "Thus, the sanctions for environmental crimes increasingly include significant terms of imprisonment." *Id.* at 40. But, "[u]nder current case law in most circuits, the standard of intent the government must show for a conviction is less than a general intent standard and does not necessarily require proof that the defendant had knowledge of all the material facts." *Id.* at 39.

Statistically, the authors report:

> EPA referrals of criminal cases to the Justice Department have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to a record 278 in 1997. Criminal fines in fiscal year 1997 were a record $169.3 million. In fiscal year 1996, 221 defendants were criminally charged with environmental offenses, and individuals were sentenced to 1,116 months in prison.

Id. at 40.

These figures would be something to cheer about if they included only serious offenses occasioned by willful conduct. But to the extent they include trivial violations occasioned by seemingly innocent conduct, these figures are cause for concern. While cases such as *Unser* give us a warm feeling because they add arithmetically to the appearance of vigorous enforcement of the law, they actually document the eroding rights of the individual--rights the courts should be protecting but are not.

According to Gaynor and Bartman, the latest amendments to each major environmental statute included new criminal penalties and strengthened existing penalties. Some of these amendments expanded the scope of criminal liability by introducing lower or no intent crimes, such as mere "negligent" conduct under the Clean Air Act. *Id.* at 40. The Clean Water Act has a similar provision. *See* 33 U.S.C. § 1319(c)(1) (providing misdemeanor penalty for first time negligent introduction of unpermitted pollutant into waterway and felony penalty of up to $50,000 per day of violation and two years in prison for subsequent violations). Moreover, "[t]he federal sentencing guidelines governs [*sic*] the sentencing of individuals convicted of environmental offenses and has limited the discretion of judges to mitigate statutory penalties, even in cases that do not involve environmental injury." *Id.* at 41.

Gaynor and Bartman conclude: "The view of environmental laws as 'public welfare' statutes and the corresponding trend toward liberal construction and precedent involving nonenvironmental public welfare statutes have complicated the issue of culpability." *Id.* at 59.

This complicated issue of culpability requires clarification by this Court. Clearly, strict criminal liability offenses are proliferating. As they expand to encompass inadvertent acts such as those taken by Unser, they put ordinary citizens at risk of criminal conviction for wholly innocent conduct. The imposition of criminal penalties in the absence of a criminal intent violates the central theme of criminal law that "wrongdoing must be conscious to be criminal" and is incompatible with a free society. *See Morissette*, 342 U.S at 252.

The observation and admonition of Gaynor and Bartman warrants the attention of this Court:

> EPA Administrator Carol Browner has advocated recent environmental criminal legislation on grounds that environmental criminals should be treated forcefully, like drug dealers. No acknowledgement is made in this connection that drug dealers usually receive a higher intent standard than has been the case in the area of environmental crimes. One of the supporters of the Environmental Crimes and Enforcement Act of 1996, Senator Frank Lautenberg, noted that it was "aimed at bad actors who violate our environmental laws purposely, intentionally, or with knowing disregard for the impact of their actions." Environmental Crimes and Enforcement Act of 1996, S. 2096, 104th Cong. (1996). These are clearly the proper targets of criminal prosecution, rather than the persons potentially and actually reached by the slip

> and-fall negligence standard that has generally been followed in this area.

Gaynor and Bartman, 10 Colo. J. Int'l Env. L & Poly at n. 334.

To protect the innocent from criminal conviction, this Court should grant the writ of certiorari and reverse the lower court.

B. Statutory Silence Does Not Imply Congress Intended to Eliminate a Criminal Intent Element Because Under *Morissette* the Existence of a *Mens Rea* Is the Rule of Law, Not the Exception

The Tenth Circuit recognized but did not seriously consider the implication of Congress' silence regarding the knowledge requirement of a crime under 16 U.S.C. § 551. That provision authorized the Secretary of Agriculture to promulgate regulations for the protection of national forests and to impose a penalty of not more than $5,000, or imprisonment for not more than six months, or both. The regulation under which Unser was prosecuted provided:

> The following are prohibited in a National Forest Wilderness:
>
> (a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal Law or regulation.

36 C.F.R. § 261.16.

The lower court acknowledged that this language reveals nothing about the intent of Congress respecting a *mens rea* element and even cited this Court's reaffirmation in *Staples v. United States*, 511 U.S. 600, that "silence on this point by itself does not necessarily suggest that the [legislators] intended to dispense with a conventional *mens rea* element." *Unser v. United States*, 165 F.3d 755, 762 (1999) (citing *Staples*, 511 U.S. at 605). However, this reference proved to be no more

than lip service as the court seized on the notion of a "public welfare offense," as expressed by this Court in *Morissette v. United States*, 342 U.S. 246.

But *Morissette* limits rather than expands the "public welfare offense" doctrine. So that case undercuts the lower court opinion here. Morissette took some old shell casings from an Air Force bombing range which he believed were abandoned scrap. After selling these casings for $84, Morissette was convicted of knowingly stealing and converting government property and sentenced to imprisonment for two months or to pay a fine of $200. The lower court ruled the "knowing" offense did not require a criminal intent, basing its ruling on the failure of Congress to express such a requisite and this Court's decisions in *United States v. Behrman*, 258 U.S. 280 (1922), and *United States v. Balint*, 258 U.S. 250 (1922), leading to the so-called "public welfare offenses." *See Morissette*, 342 U.S. at 250.

This Court acknowledged it had, on occasion, construed mere omission of "any mention of criminal intent as dispensing with it," but this Court reversed the lower court in *Morissette* pointing out with great care the dangers of a verbatim reading of its prior cases:

> If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more--it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a resume of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

Id. at 250.

This Court's philosophy of criminal law was eloquently stated this way:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id.

The Tenth Circuit in this case is guilty of too much literalness and ascribing more to the "public welfare offense" doctrine than was contemplated. Its holding that a purely innocent act may subject the actor to criminal liability is inconsistent with any fair-minded philosophy of criminal law and sweeps within its arms a whole array of federal statutes--particularly those designed for natural resource protection--that do not expressly preserve a *mens rea* requirement.

In *Morissette*, this Court characterized "public welfare offenses" as those cases in which the penalties are small, conviction does no grave harm to one's reputation, and where one assumes a special responsibility to protect the public from one's acts. *Id.* at 256. But these factors converge rarely and, in this case, not all.

As Petitioner aptly explains, Unser was potentially subject to a criminal penalty of up to six months in jail or $5,000 in fines, or both. It is inconceivable that anyone's liberty could be taken away for six months and be characterized as a "small"

penalty. Our forefathers would not have sold their freedom so cheaply. As to reputation, Unser was openly ridiculed in the press for his wanton destruction of the environment, although his trespass was inadvertent and caused no harm. Even a misdemeanor conviction carries a taint no innocent party should have to bear. How could any of us explain six months in jail to a young child or a friend or co-worker? It is both callous and ridiculous to treat any criminal violation as of little consequence and no grave harm to one's reputation. With respect to a special responsibility to protect the public, this factor simply does not apply to Unser's situation. He had no reason to believe his innocent outing would become life threatening and force him into a technical violation of the law.

This assessment demonstrates how unlikely it is that Congress ever intended to hold someone in Unser's position criminally liable without a proven criminal intent. The Tenth Circuit interpretation sweeps too widely. Virtually all of our criminal laws serve to protect public health and welfare. All of us are capable of unwitting acts that put us in conflict with such laws. This Court should not allow federal statutes to be read to dispense with a *mens rea* where doing so would make criminals out of ordinary citizens.

Accordingly, the conclusion of this Court in *Morissette* has equal force here: "We think presumptive intent has no place in this case." *Morissette*, 342 U.S. at 275. To protect fundamental freedoms and reinforce the rule of law, this Court should grant the writ of certiorari and limit the lower court's expansive reading of the "public welfare offense" cases.

C. This Court's Holding in *Staples* Undercuts the Lower Court's Expansive Reading of the "Public Welfare Offense" Because This Court Will Not Infer from Silence That Congress Intended to Criminalize Apparently Innocent Conduct

The Tenth Circuit was so taken with the dicta of this Court's 1952 *Morissette* decision, that it all but ignored the more recent precedent of *Staples v. United States*, 511 U.S. 600. The point the lower court missed in *Staples* is that the innocence of the regulated conduct is a factor in defining a "public welfare offense."

In *Staples*, as in the present case, Congress was silent with respect to the *mens rea* element of a crime. Under The National Firearms Act, 26 U.S.C. §§ 5801-5872, the petitioner was convicted of possession of a "machine gun." The Act made it a crime, punishable by up to ten years in prison for any person to possess a firearm, including a "machine gun," that is not properly registered. Petitioner's unregistered gun met the definition of a "machine gun," but he argued his knowledge of the status of his gun must be proven. This Court agreed, holding:

> As in our prior cases, our reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items.

Staples, 511 U.S. at 619.

This common sense evaluation focused on the innocence of owning a gun where possession was a crime. The government argued Congress intended the Act to regulate and restrict the circulation of dangerous weapons and so falls under the "public welfare" rubric. This Court acknowledged, as it had in *Morissette*, that in some limited circumstances it had inferred

from silence that Congress did not intend to require proof of criminal intent to establish an offense. Such circumstances included, for example, the undocumented sale of narcotics (*United States v. Balint*, 258 U.S. 250) and the unregistered possession of grenades (*United States v. Freed*, 401 U.S. 601 (1971)). But this Court castigated the government for glossing over the distinction between grenades and guns, and ignoring "the particular care [the Court had] taken to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples*, 511 U.S. at 610 (citing *Liparota v. United States*, 471 U.S. 419 (1985)).

One case in which this Court took particular care was *Liparota v. United States*, 471 U.S. 419 (1985). In that case, this Court considered a statute that criminalized the unauthorized acquisition or possession of food stamps. No *mens rea* was mentioned. This Court held the statute required proof that the defendant knew his possession of food stamps was unauthorized, "largely because dispensing with such a *mens rea* requirement would have resulted in reading the statute to outlaw a number of apparently innocent acts." *Staples*, 511 U.S. at 610. So it is in the present case. Unser's possession and operation of his snowmobile was both legal and innocent. The violation of the Wilderness Area regulation only came about by happenstance when Unser and his friend lost their way and wandered into the unmarked area in a snow storm. The Tenth Circuit ruling in this case results in the very evil this Court was trying to avoid in *Liparota*--outlawing apparently innocent acts.

> If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both

> the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emission levels, wholly unbeknownst to him, began to exceed legal limits between regular inspections.

Id. at 614.

Had this Court wanted to expand the reach of "public welfare offenses," it could have characterized the vehicle emission exceedence as such a crime and ignored Congress' silence regarding *mens rea*, as did the Tenth Circuit in this case. Instead, this Court stated it would hesitate--on the basis of silence--to find Congress intended to abrogate criminal intent for innocent parties.

But *Unser* presents even a stronger case for hesitation than this Court's hypothetical in *Staples*. Snowmobiles may be dangerous, but no more than cars and certainly less than guns. They are not as highly regulated as cars and Unser's entrance into the Wilderness Area under extremis and zero visibility conditions was wholly unbeknownst to him. If the lower courts don't hesitate to conclude on the basis of silence that Congress intended a prison term to apply to such a case, any conduct, no matter how innocent, could be brought within the embrace of a "public welfare offense."

But in *Staples* the government doggedly argued the National Firearms Act should be interpreted on the assumption that "one would hardly be surprised to learn that owning a gun is not an innocent act." *Id.* at 610. In response, this Court declared that assumption is not supported by common experience and stated that guns, in general, are not "deleterious

devices or products or obnoxious waste materials" that put their owners on notice that they stand "in responsible relation to a public danger." *Id.* at 610-11. The government protested, however, that guns, unlike food stamps but like grenades and narcotics, are potentially harmful devices. This Court's answer is instructive:

> Under this view, it seems that *Liparota's* concern for criminalizing ostensibly innocuous conduct is inapplicable whenever an item is sufficiently dangerous--that is, dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with *mens rea*. But that an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence.

Id. at 611.

If the innocent possession of a deadly gun does not qualify as a "public welfare offense," how could the innocent possession of a snowmobile in an unmarked forest? As this Court suggested, "a commonsense evaluation" of the nature of the regulated device and the expectations individuals have in dealing with the device, dictate such innocent conduct is not a "public welfare offense" for which this Court would infer from silence that Congress intended to do away with a guilty intent. Unser was indeed surprised, even amazed, that his possession of a snowmobile in a life or death situation was not an innocent act. At no time was Unser on notice that he stood "in responsible relation to a public danger" on a par with those who deal in

narcotics or possess hand grenades. Also, the lower court readily concedes that Unser's conduct "does not seem to seriously threaten a community's health or safety." *Unser*, 165 F.3d at 762-63.

Therefore, this Court's conclusion in *Staples* applies equally to this case:

> As we noted in *Morissette*, the "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." ... We are reluctant to impute that purpose to Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation in the form of a statute such as [the National Firearms Act].

Staples, 511 U.S. at 615-16.

This Court should grant the writ of certiorari and overturn the decision below. That decision expands "public welfare offenses" to include wholly innocent conduct.

CONCLUSION

In *Morissette*, this Court stated:

> This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to a jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.

Morissette, 342 U.S. at 247.

That statement could be said of the present case. An otherwise "insignificant case" has been so litigated as to require, once again, an examination of some of the most fundamental concepts in criminal law. Over the past 47 years, the lower courts have taken this Court's acknowledgment of the "public

welfare offense" doctrine in *Morissette* to extremes, finding criminal even the most innocuous conduct. Without the intervention of this Court, the trend will continue at the cost of individual freedom and liberty--a price too high to pay for prosecutorial convenience. This Court should grant review and overturn the lower court decision.

DATED: May, 1999.

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